FILED

SEP 6 2002

02 898 SEP 10 2002

OFFICE OF THE CLERK

No.

In the

Supreme Court of the United States

TOM FIESEL,

Petitioner,

v.

DESSIE F. CHERRY, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL APPENDIX

Trang Q. Tran
Counsel of Record
Tran Law Firm L.L.P
440 Louisiana Ste. 590
Houston, Texas 77002
(713) 223-8855
Attorneys for Petitioner

CURRY & TAYLOR • (202) 393-4141 • HTTP://USSCINFO.COM

14 pp

TABLE OF CONTENTS

TABLE OF CONTENTS i

DISTRICT COURT MEMORANDUM AND RECOMMENDATION (11/02/00) 25a

CIVIL ACTION NO. H-99-3549

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

TOM FIESEL,
Plaintiff,

v.

JAMES WILLET, et. al.,
Defendants.

November 2, 2000 Filed

MEMORANDUM AND RECOMMENDATION

Defendants James Willett, Dessie F. Cherry and Lepher Jenkins (collectively referred to as "the Defendants"), each employees and officials of an agency of the State of Texas, the Texas Department of Criminal Justice ("TDCJ") seek, pursuant to Rule 56(c), Fed. R. Civ. P., the summary dismissal of Plaintiff Tom Fiesel's ("Fiesel") claims against them, contending that Fiesel's allegations fail to raise a genuine issue of material dispute as to whether their conduct violated his civil rights. See Defendants' Motion for Summary Judgment (Entry #25). Fiesel opposes their request for summary judgment and maintains that the Defendants used their positions to abridge his First Amendment right to freedom of speech, thereby rendering Defendants culpable for violations of his civil rights, as recognized by 42 U.S.C, § 1983;fn1 and, that summary judgment would be improper as there remain genuine disputes as to material facts raised by his allegations. See Plaintiffs Response to Motion for Summary Judgment (Entry #31).

FACTS

Fiesel's lawsuit, filed October 14, 1999, asserts that in

1998, he was a correctional officer with the TDCJ's Institutional Division. On January 1, 1998, a friend and co-worker, Michael Bloodworth ("Bloodworth"), asked him to attend a meeting, as a non-participating observer, scheduled that evening with his supervisor, Dessie F. Cherry ("Cherry"), a Senior Warden with TDCJ. Bloodworth related to Fiesel that he suspected the meeting would involve discussions related to charges that Bloodworth had engaged in a drug transaction with at least one TDCJ inmate. Fiesel, assured that his attendance was permitted by Cherry, consented to attend the meeting. That evening, after completing his job for the day, Fiesel met Bloodworth in Cherry's offices, where Cherry then advised Bloodworth that he was suspected of criminal activities and the Internal Affairs Division ("LAD") wished to question him, immediately. Cherry requested that Fiesel and Bloodworth step outside her office to allow the arrival of the IAD investigators. Fiesel and Cherry stepped into a hallway, an area just outside Cherry's secretary's office. Cherry's secretary's office was immediately adjacent to Cherry's office. While standing outside Cherry's office, and unaware that two IAD investigators were standing nearby, Fiesel and Bloodworth discussed Bloodworth's situation. Fiesel advised Bloodworth to consult an attorney, prior to submitting to an IAD interrogation. See Bloodworth deposition at Exhibit 11, attached to Plaintiff's Response to Motion for Summary Judgment (Entry #32). Bloodworth then went into the secretary's office to indicate his desire to consult with an attorney prior to submitting to an IAD interrogation. Two individuals, standing just inside the secretary's office, then identified themselves to Bloodworth and Fiesel, as IAD investigators, Robert D. Pittman and Mark Cole, and advised Fiesel to cease interfering with their investigation. Fiesel told the officers that Bloodworth, as an employee, had the same rights as other United States citizens and had the right to [consult with] an attorney before being questioned by the police.fn2 Both Officers Pittman and Cole then advised Fiesel that he was trespassing. Defendants contend that Fiesel became hostile and angry and refused to show identification following a demand from the investigators. See Cherry Inter-Office Communication,

Exhibit 5 attached to Plaintiff's Response to Motion for Summary Judgment (Entry #32). Fiesel maintains, however, that after being told to leave, he did so without altercation, and Investigator Pittman escorted Fiesel out of the building to the facility's front gate. Fiesel was charged with tampering with a witness (a Code 44 Level 1 violation) and failure to obey a proper order from an authority (a Code 13 Level 2 violation). See Fiesel Affidavit, Exhibit 6 of Plaintiffs Supplemental Exhibits (Entry #37); Exhibit 2, attached to Plaintiff's Response to Motion for Summary Judgment (Entry #32). Fiesel never returned to his state position following the incident.

Thereafter, on February 13, 1998, Fiesel was terminated as a result of the Code 13 and 44 violations and upon the charges, recommendations and/or approval of Cherry, Lepher Jenkins, the Region I Director; James Willett, the Senior Warden; James Bush, Director, Human Resources and Staff Development; Janie Cockrell, Deputy Director; Cynthia Milne of Legal Affairs; and, Gary L. Johnson, the Executive Director. See Exhibits 5 and 7, attached to Plaintiffs Response to Motion for Summary Judgment (Entry #32); see also Exhibit D, attached to the exhibits (Entry #27) of Defendants' Motion for Summary Judgment. Fiesel contends that as he was at Cherry's office at the conclusion of his workday, that be was "on his own time," and was advising Bloodworth as a friend and citizen of the United States and not as an employee of TDCJ and that, accordingly, his firing was in retaliation for exercising his First Amendment constitutional right to freedom of speech in violation of 42 U.S,C. § 1983. Fiesel is seeking reinstatement to his position as a correctional officer, as well as monetary and injunctive relief.fn3

ANALYSIS

Motion for Summary Judgment

Summary judgment is proper only if there is no genuine dispute as to any material fact and the moving party is

entitled to judgment as a matter of law and, thereby, alleviates the necessity of a trial. See Crawford-El v. Britton, 523 U.S. —, 118 S.Ct. 1584, 1598 (1998); see also Fed. R. Civ. P. 56(c). A factual dispute is "genuine" when a reasonable jury could return a verdict for the nonmoving party. PYCA Industries, Inc. v. Harrison County Waste Water Management District, 177 F.3d 351, 361 (5th Cir. 1999); Crowe v. Henry, 115 F.3d 294, 296 (5th Cir. 1997). All inferences on summary judgment must be drawn in favor of the nonmoving party, to the extent that if there appears to be some evidentiary support for the disputed allegations, the motion must be denied. Anderson v. Liberty Lobby. Inc., 477 U.S. 242, 247 (1986); McAllister v. R.T.C., 201 F.3d 570, 574 (5th Cir, 2000). Once the summary judgment motion is made and properly supported, however, the burden shifts from the movant to the adverse party, who may not rest on mere allegations or denials, but must set forth specific and supported material facts, of significant probative value, to preclude summary judgment. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986); International Association of Machinists and Aerospace Workers v. Compania Mexicana de Aviacion, S.A. de C. V., 199 F.3d 796, 798 (5th Cir. 2000); Union. Planters National Leasing, Inc. v. Woods, 687 F.2d 117, 119 (5th Cir. 1992).

DISCUSSION

1. The First Amendment Retaliation Claim

A State may not retaliate against an employee for exercising his First Amendment right to free speech. Rankin v. McPherson, 483 U.S. 378, 383 (1987); Perry v. Sindermann, 408 U.S. 593, 597 (1972); Bradshaw v. Pittsburg Indep. Sch. Dist., 207 F.3d 814, 81.5 (5th. Cir. 2000); Anderson v. Pasadena Indep. Sch. Dist., 184 F.3d 439, 444 (5th Cr. 1999). In order to successfully prosecute his First Amendment retaliation claim, Fiesel must establish that he suffered an adverse employment decision and that his speech motivated the defendants' alleged retaliatory conduct. Mt. Healthy Bd. of. Educ. v. Doyle, 429 U.S. 274 (1977): Bradshaw v. Pittsburg

Indep. Sch. Dist., 207 F.3d at 815; Gerhart v. Hayes, 217 F.3d 320, 321 (5th Cir. 2000); Harris v. Victoria Indep. Sch. Dist., 168 F.3d 216, 220 (5th Cir. 1999). It should also be remembered, however, that First Amendment advocacy must give way to lawful governmental investigations, Brandenburg v. Ohio, 395 US, 444, 447 (1969); see also ACLU Foundation of Southern California v. Barr. 952 F.2d 457, 471 (9th Cir. 1991); and, generally, a public employee's right to free speech is limited when the exercise of free speech conflicts with the role of the public employee. Rankin v. McPherson, 483 U.S. at 383; Bradshaw v. Pittsburg Indep. Sch. Dist., 207 F.3d at 815. Accordingly, as a further threshold requirement to First Amendment constitutional protection, the public employee must establish that the speech in dispute addresses a matter of public concern and that the employee's interest in speaking outweighs the employer's interest in efficiency and discipline in the workplace. Connick v. Myers, 461 U.S. 138, 146-47 (1983); Kennedy v. Tangipahoa Parish Library, 224 F.3d 359, 366 (5th Cir. 2000); Teague v. City of Flower Mound, Texas, 179 F.3d 377,380(5th Cir. 1999). Otherwise, a court will not scrutinize whether the speech motivated a discharge from public employment. See Bradshaw v. Pittsburg Indep. Sch. Dist., 207 F. 3d at 816; Click v. Copeland, 970 F.2d 106, 111 (5th Cir. 1992); Dodds v. Childers 933 F.2d 271 273 (5th Cir. 1991).

The determination as to whether the speech evoked by the public employee related to a matter of public concern, is a question of law to be resolved by the court. Rankin v. McPherson, 483 U.S. at 386 n.9; Bradshaw v. Pittsburg Indep. Sch. Dist., id; Tompkins v. Vickers, 26 F.3d 603, 606 (5th Cir. 1994). The analysis must consider the totality of the circumstances surrounding the speech at issue, to assess whether the individual spoke primarily as a citizen rather than as an employee of a public entity. Bradshaw v. Pittsburg Indep. Sch. Dist., 207 F.3d at 816; Thompson v. City of Starkville, 901 F.2d 456, 461 (5th Cir. 1990).

There is no dispute that the termination of Fiesel's employment with the State constituted an "alteration of

important conditions of employment" and, thereby, an adverse employment action contemplated by the First Amendment retaliation claim analysis. See Breaux v. City of Garland 205 F.3d 150, 157 (5th Cir. 2000); Pierce v. Texas Dept. of Criminal Justice, Institutional Div., 37 F.3d 1146, 1149 (5th Cir. 1994); Bickel v. Burkhart, 632 F.2d 1251, 1255 n.6 (5th cir. 1980). Nor, is there any argument with Fiesel's contention that it was his speech that precipated the termination of his state employment.fn4

Fiesel's assertions, made on behalf of Bloodworth, do not require the "mixed speech" analysis advanced by the decision in Connick v. Myers, 461 U.S. 138, 147 (1983); as there is no contention that any portion of Fiesel's statements were directed to acquire some personal employment benefit; and, it is clear that when evaluating Fiesel's statements in light of their content, form and context, that they were made solely as a citizen with respect to the availability of civil rights protections he felt were afforded another. See Kennedy v. Tangipahoa Parish Library, 224 F.3d at 366; see also Benningfield v. City of Houston, 157 F.3d 369, 375 (5th Cir. 1998), cert. denied U.S. 119 S.Ct. 1457 (1999).

The Defendants maintain, as a defense to the claim of First Amendment retaliation,, that they were justified in dismissing Fiesel, nonetheless, because Fiesel's statements impaired the efficiency and discipline necessary for the State agency to meet its governmental mission and objectives. See Defendant's Motion for Summary Judgment (Entry #26). Despite Fiesel's statements with respect to a matter of public concern, the speech may not merit constitutional protection if found to be outweighed by the State's interest as an employer, to promote the efficiency of the public services it performs through its employees. Rankin v. McPherson, 483 U.S. at 388; Pickering v. Board of Educ. of Township High Sch. Dist. 205, Will County, Illinois, 391 U.S. 563, 568 (1968); Click v. Copeland, 970 F.2d at 111. It is the State's burden to establish, however, that its interest in maintaining efficiency and discipline in the workplace outweighs Fiesel's constitutional right to freedom of speech. Rankin v.

McPherson, 483 U.S. at 388; Connick v. Myers, 461 U.S. at 150. In this instance the Defendants failed to establish that Fiesel's statements, articulated while he was off-duty, in plain streetclothes rather than a work issued uniform, and made in the waiting area of a non-public office, constituted speech that was disruptive,, preclude the IAD investigation or, otherwise impaired the mission of the correctional agency. Defendants have failed to evince, without dispute, the manner in which Fiesel's statement; were calculated to be disruptive, were disruptive or served to undermine agency mission or discipline. In order to secure summary judgment as to the merits of Fiesel's First Amendment retaliation claim, Defendants must establish that there is no genuine issue as to any material facts as to their defense of impairment of efficiency and discipline. There is clearly genuine dispute as to whether Fiesel's statements were disruptive or undermined agency discipline. See Fiesel Affidavit Exhibit 6 of Plaintiff's Supplemental Exhibits (Entry #37); Robert Pittmon deposition, Exhibit J of Defendants' exhibits (Entry #27) to Motion for Summary Judgment. Furthermore, the disclosure of police misbehavior, i.e., the withholding of constitutionally secured rights in order to secure possible criminal prosecutions, is a matter of public concern that would outweigh the Defendants' interest in efficiency. See Breaux v. City of Garland, 205 F.3d at 157 n. 10; Teague v. City of Flower Mound, 179 F.3d at 381 (5th Cir. 1999); see also Kennedy v. Tangipahoa Parish Library, 224 F.3d at 373 n. 16.

The Defendants also contend that because the investigation of Bloodworth did not lead to a criminal prosecution and that they apprised Bloodworth of his rights under Garrityfn5 (an assurance that any self-incriminating statements would not be used against him in a criminal proceeding), that it was clear the investigation would not culminate in Bloodworth's criminal culpability and, therefore, Bloodworth had no right to an attorney. See Garrity Warnings and Assurances attached as Exhibit "I" to Defendants' exhibits (Entry #27) to Motion for Summary Judgment. There remains, however, a factual dispute as to whether at the time

Fiesel made his statements he was aware that Bloodworth had been given his Garrity warnings (see Plaintiff's Response to Motion for Summary Judgment (Entry #31) at para. 55-60; see also Fiesel's Affidavit at p. 5, attached as Exhibit 6 to Plaintiff's Supplemental Exhibit (Entry #37) and deposition testimony of Pittman at p. 98, identified as Plaintiffs Exhibit 10 (Entry #32), as Fiesel contends he, was unaware, at the time that he spoke, that Bloodworth had been given Garrity warnings and Officer Pittmon contends that Bloodworth had not been given Garrity warnings nor had a Garrity-type proceeding been explained to either Fiesel or Bloodworth, at the time Fiesel made his statements. Fiesel may have misconstrued the legal necessity for Bloodworth to have an attorney in attendance; however, it remains an issue to be resolved by a fact finder and Fiesel's mistake, if any, does not eliminate his constitutional right to advise another to seek legal advice before participating in what was believed by the speaker to be a criminal investigation. See Denton v. Morgan, 136 F.3d 1038, 1043 (5th Cir. 1998).

As Fiesel has established that he suffered an adverse employment decision and that his employment termination was motivated by the Defendants' conduct; and, the Defendants have failed to establish that Fiesel's speech, which should be found to be a matter of public concern, is outweighed by its interest in maintaining efficiency and discipline in the workplace, the Defendants' request for summary dismissal as to Fiesel's claim of First Amendment retaliation must be denied.

II. The Qualified Immunity Defense

The Defendants maintains that Fiesel's claims are barred by the affirmative defense of qualified immunity. The qualified immunity defense affords Defendants officials the necessary protection in their decision making processes from the claims of constitutional deprivations. Butz Economou, 438 U.S. 478, 503 (1978). Qualified immunity will shield an official performing discretionary functions from civil damages liability, provided his actions meet the test of

objective legal reasonableness, Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982); Piazza v. Mayne, 217 F.3d 239, 244 (5th Cir. 2000); Sorenson v. Ferrie, 134 F.3d 325, 327 (5th Cir. 1998).

A two-part inquiry is utilized to determine whether an official's alleged conduct meets the "objective legal reasonableness" test, by making a determination as to whether the plaintiff has alleged a violation of a clearly established constitutional right. Hanlon v. Berger, — U.S. slip op. at 2 (May 24, 1999); Siegert v. Gilley, 500 U.S. 226, 231-32(1991); White v. Balderama, 153 F.3d 237, 240 (5th Cir. 1998); Lampkin v. City of Nagodoches, 7 F.3d 430, 434 (5th Cir. 1993). "Clearly established," for purposes of qualified immunity means that "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." U.S. v. Lanier, 520 U.S. 259, 270 (1997); Anderson v. Creighton, 483 U.S. 635, 639 (1987); Thomas v. City of Dallas, 175 F.3d 358, 364 (5th Cir. 1999). The second determination involves considering if the violation occurred, under the circumstances known to the defendants, could objectively reasonable officials believe that their conduct did not violate clearly established law. Crawford El v. Britton, — U.S. —' 118 S.Ct. 1584 at 1593-94; Wooley v. City of Baton Rouge, 206 F.3d 574, 580 (5th Cir. 2000); Baker v. Putnal, 75 F.3d 190, 198 (5th Cir. 1996). This is not to say that an official's action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of pre-existing law, the unlawfulness must be apparent. id. The objective reasonableness of the public officials' actions is a matter of law for the courts to determine; however, the underlying historical facts precipitating the alleged conduct are material to reasonableness and concededly, may be in dispute.fn6 Shipp v. McMahon, 199 F.3d 256(5th Cir. 2000); Mongieri v. Clifton, 29 F.3d 1012, 1015-16 (5th Cir. 1994).

Fiesel, in alleging a First Amendment retaliation claim, has asserted a violation of a clearly established constitutional right. Connick v. Myers, 461 U.S. at 150; Kennedy v. Tangipahoa Parish Library, 224 F.3d 359 at 377. Fiesel has,

therefore, successfully rebutted the first prong of the qualified immunity test. Moreover, Fiesel has presented a fact issue as to whether Defendants acted in an objectively reasonable manner in light of his clearly established rights. As has been discussed, the Defendants failed to establish that Fiesel's speech constituted a threat to its interest in the effective and efficient fulfillment of its responsibilities to the public and, in doing so, the Defendants concomittantly failed to show that it considered the effect of Fiesel's speech a threat to the agency's efficiency before implementing disciplinary action, the minimum required by the McBeefn7-Pickering-Connick balancing test. Rankin v. McPherson, 483 U.S. at 390; Kennedy v. Tangipahoa Parish Library 224 F.3d at 377; Click v. Copeland 970 F.3d at 112. Fiesel has met the second prong of the qualified immunity test, thus, defeating the Defendants' claim to summary judgment as to the defense. See Kennedy v. Tangipahoa Parish library, id; see also Click v. Copeland, 970 F.2d at 112.

Viewing the facts presented in the light most favorable to Fiesel, as the summary judgment analysis compels, he has alleged a violation of a clearly established right and also raised fact issues as to whether the Defendants acted in an objectively reasonable manner in light of the Plaintiff's dearly established rights. See Kennedy v. Tangipahoa Parish Library, 224 F.3d at 379. Defendants' request for summary judgment as to qualified immunity must, therefore, also be denied.

CONCLUSION

As there have been presented genuine issues as to material facts raised as to the issues of the merits of Plaintiffs First Amendment retaliation allegations and Defendants' claim of qualified immunity, it is

RECOMMENDED that Defendants' Motion for Summary Judgment (Entry #26) be DENIED.

The Clerk of Court shall file this Memorandum and Recommendation and provide the parties with a true copy.

The failure to file written objections to the proposed findings and recommendations within ten (10) days of the entry of this Memorandum and Recommendation, may bar an aggrieved party, except upon grounds of plain error, from attacking the proposed factual findings and legal conclusions, on appeal. See Acuna v. Brown & Root, Inc., 200 F.3d 335, 340(5th Cir. 2000); Douglas v. United Services Automobile Assoc., 79 F.3d 1415, 1424(5th Cir. 1996)(en banc); see also Crawford v. Falcon Drilling Co., Inc., 131 F.3d 1120, 1123-24(5th Cir. 1997).

SIGNED at Houston, Texas, on this the 1st day of November, 2000.

Calvin Botley
United States Magistrate Judge

Footnotes

fn1 Fiesel dismissed his 42 U.S.C. § 1985 claim. See Plaintiff's Motion to Voluntary Dismiss Claim (Entry #34).

fn2 There is a dispute as to whether in fact this was the statement made by Fiesel, as Cherry contends Fiesel merely stated Bloodworth was not under arrest and didn't have to stay. See Cherry deposition at Exhibit 8, p.66 attached to Plaintiff's Response to Motion for Summary Judgment (Entry #32); see also Pittman deposition at p.59 of Exhibit I of exhibits (Entry #27) to Defendants' Motion h Summary Judgment. For purposes of summary judgment review, however, Defendants concede that Fiesel's speech consisted of the statements he alleges. See Defendants' Motion for Summary Judgment (Entry #26).

fn3 Additionally, Fiesel seeks reimbursement of attorneys' fees as allowed by 42 U.S.C. § 1988.

fn4 Additionally it is clear that the Defendants envisioned the manner in which Fiesel "tampered" with the witness (Bloodworth) was through his speech. More

importantly, the determination as to the employer's motivation requires a factual assessment prohibiting summary judgment review. See Click v. Copeland, 970 f.2d at 112.

fn5 See Garrity v. New Jersey, 385 U.S. 493, 500 (1967).

fn6 See also, Lisa R. Eskow & Kevin W. Cole. The Unqualified Paradoxes of Qualified Immunity: Reasonably Mistaken Beliefs Reasonably Unreasonable Conduct, and the Specter of Subjective Intent That Haunts Objective Legal Reasonableness, 50 Baylor L. Rev. 869, 872-878 (1998).

fn7 McBee v. Jim Hogg County, Tex., 730 F.2d 1009 (5th Cir. 1984).